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IN THE
COURT OF APPEALS OF INDIANA

DJUAN EDWARDS,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A04-0509-CR-549
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Tanya Walton-Pratt, Judge
Cause No. 49G01-0406-MR-96675

October 17, 2006

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Judge

Case Summary and Issues

Following his jury trial, Djuan Edwards appeals his convictions of murder, a felony, attempted murder, a Class A felony, and carrying a handgun without a license, a Class A misdemeanor. Edwards raises three issues for our review: (1) whether the trial court properly admitted a recorded conversation in which one of the speakers was unavailable at Edwards's trial; (2) whether the trial court properly admitted a recorded 911 call in which a person who can be heard giving the speaker information was unavailable at Edwards's trial; and (3) whether the trial court properly denied Edwards's motion for a mistrial based on the State's display of information relating to Edwards's other crimes and bad acts. We affirm Edwards's convictions, concluding that the trial court did not err in admitting the recorded 911 call or denying Edwards's motion for a mistrial, and that although the taped conversation should have been excluded as inadmissible hearsay, the admission constituted harmless error.

Facts and Procedural History

On May 17, 2004, Michael Moss saw Edwards at the home next door to Moss's home. Moss was suspicious that Edwards was selling drugs, and confronted Edwards, telling him to stop selling drugs in the area. After the confrontation turned physical, Edwards left in his vehicle. Shortly thereafter, Edwards returned and shot Moss several times as Moss was walking out his front door. After receiving treatment at the hospital, Moss reported the incident to the police and identified Edwards as the shooter.

Early in the morning on May 29, 2004, Michael Solomon and Jermaine Foster were returning to Foster's home after visiting a club in downtown Indianapolis when they saw

Edwards's car parked near Moss's residence. Concerned for Moss's safety, Solomon parked his car at Foster's residence and the two went to Moss's house, where they found Moss and his girlfriend, April Adkisson. Foster then called 911, and told the operator that Edwards was outside and that he was wanted for attempted murder.[1] Solomon and Foster returned to Solomon's car to wait for the police, who never arrived. After sitting in the car for several minutes, Solomon and Foster decided to leave. When Solomon attempted to start his car, Edwards fired several shots into the vehicle, killing Solomon and wounding Foster.

Prior to Edwards's trial for Solomon's murder, Moss and Adkisson were killed in Moss's home. Edwards was charged in connection with their deaths based on evidence that, while in prison, Edwards had instructed others to kill Moss, Adkisson, and Foster to prevent them from testifying in this case. Before Moss and Adkisson were murdered, they had given statements implicating Edwards in Solomon's murder.

At a pre-trial hearing, the trial court ruled that the State could introduce evidence that Moss and Adkisson had identified Edwards as being in the area on May 29, but ruled their statements describing the shooting inadmissible because they would violate Edwards's Sixth Amendment right to confront witnesses against him under Crawford v. Washington, 541 U.S. 36 (2004). The trial court ruled that the State could introduce evidence that Moss and Adkisson were dead in order to explain why they were not testifying at trial, but that the State could not introduce evidence relating to Edwards's involvement in the murders of Moss and Adkisson under Indiana Evidence Rule 404(b) because of the highly prejudicial effect.

[1] At this point, there was in fact no warrant out for Edwards's arrest.

However, during the State's opening statement, it displayed a chart indicating that Adkisson and Moss were dead and that Edwards had been named as a defendant in connection with their deaths.[2] Edwards's counsel did not object at the time this chart was set up, but moved for a mistrial after the State had completed its opening statement. The trial court denied the motion, but ordered that the State remove the chart. The trial court also modified its order from the Rule 404(b) hearing and ordered that the State could not introduce any evidence that Moss and Adkisson were dead, and could introduce evidence that showed only that they were unavailable to testify. The court also read the following to the jury:

> And the Court is going to admonish you that opening statements are not evidence. What the attorneys just stated and what you just observed, and was just presented, is not evidence. It's merely what each of the parties believe[s] you're going to hear from the witnesses. The actual evidence will be what you received from the witness stand – both statements and exhibits that are admitted from the witness stand.

Transcript at 20.

During trial, the State introduced two recorded conversations over Edwards's objection. The first recording is of a conversation between Moss and Officer Gooch of the Indianapolis Police Department. During this conversation, Moss identifies Edwards as the person who had shot him on May 17, and indicates that Edwards had been selling drugs in the neighborhood. The second recording is the 911 call that Foster made prior to Solomon's murder on May 29. During this conversation, Foster indicates that Edwards is in the area, that he is "wanted," and gives a description of Edwards. Moss can be heard in the

background giving information to Foster.

A jury found Edwards guilty of murder, attempted murder, and carrying a handgun without a license; the trial court sentenced him to an aggregate of eighty-five years. Edwards now appeals.

Discussion and Decision

I. Conversation Between Moss and Officer Gooch

Edwards argues that the admission of the taped conversation between Moss and Officer Gooch violated his right to confront the witnesses against him, as guaranteed by the Sixth Amendment to the United States Constitution, and that the conversation constituted inadmissible hearsay. We do not reach Edwards's Confrontation Clause argument because we agree that the conversation is hearsay and is not admissible under any exception.[3] However, we also hold that the error in admission constitutes harmless error.

A. Standard of Review

We review a trial court's decision to admit evidence for abuse of discretion. Collins v. State, 826 N.E.2d 671, 677 (Ind. Ct. App. 2005), trans. denied, cert. denied, 126 S.Ct. 1058 (2006). We will find that a trial court has abused its discretion when its decision is "clearly against the logic and effect of the facts and circumstances before it." Id. Even when we find that a trial court has abused its discretion by admitting evidence, we will not reverse unless

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[2] The chart did not specify the charges against Edwards, and merely listed him as a defendant in connection with the deaths of Moss and Adkisson.

[3] We also decline to determine the appropriate burden of proof for the forfeiture by wrongdoing exception to a defendant's right to confrontation under Indiana law.

the defendant's substantial rights have been affected. Ind. Evidence Rule 103(a); Pruitt v. State, 834 N.E.2d 90, 117 (Ind. 2005), cert. denied, 126 S.Ct. 2936 (2006). In determining whether or not a party's substantial rights were affected by the erroneous admission of evidence, we "assess the probable impact of that evidence upon the jury." Corbett v. State, 764 N.E.2d 622, 628 (Ind. 2002).

B. Admission of the Conversation

The State argues that the statement should be admissible based on the "forfeiture by wrongdoing" exception to Edwards's right to confrontation. The United States Supreme Court has indicated that a criminal defendant waives his confrontation rights when the absence of a witness is caused by the defendant's wrongdoing. Davis v. Washington, 126 S.Ct. 2266, 2280 (2006). Therefore the admission of evidence under the forfeiture by wrongdoing exclusion from hearsay of Federal Rule of Evidence 804(b)(6) does not violate a defendant's right to confrontation. Id. The Indiana Supreme Court has recognized the forfeiture by wrongdoing doctrine without explaining its contours under Indiana law. Hammon v. State, 853 N.E.2d 477, 478 (Ind. 2006); Fowler v. State, 829 N.E.2d 459, 467-68 (Ind. 2005), cert. denied, 126 S.Ct. 2862 (2006). However, even if Indiana does recognize forfeiture by wrongdoing as an exception to the right to confrontation, the Indiana Evidence Rules, unlike their federal counterpart, do not identify forfeiture by wrongdoing as an exception to hearsay.[4] Because forfeiture by wrongdoing is not an exception to or exclusion

[4] The State argues that the federal rule regarding forfeiture by wrongdoing was adopted merely to codify existing common law. Although this argument may have some validity, in Indiana the common law

from hearsay, the recorded conversation cannot be admissible under this theory.

The trial court also admitted the conversation under the excited utterance exception to hearsay. This exception allows the admission of statements "relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." Ind. Evid. R. 803(2). There is no bright line test for how much time may elapse between the event and the statement; instead, "[t]he issue is 'whether the declarant was still under the stress of excitement caused by the startling event when the statement was made.'" Wallace v. State, 836 N.E.2d 985, 991 (Ind. Ct. App. 2005), trans. denied (quoting Taylor v. State, 697 N.E.2d 51, 52 (Ind. 1998)).

Here, the conversation took place two days after Edwards shot Moss. While this passage of time is not dispositive, we conclude that Moss was clearly not still under the stress of the shooting during his conversation with Officer Gooch.[5] Moss's voice sounds calm, and in no way indicates that he was still under the stress or excitement of the shooting. Because this statement is not an excited utterance, and is not admissible under any other exception to hearsay, the trial court abused its discretion in admitting this conversation.

However, we conclude that the admission of this conversation constitutes harmless

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has not established that forfeiture by wrongdoing is an exception to hearsay. Cf. Fowler, 829 N.E.2d at 468 ("Indiana courts have never addressed the applicability of forfeiture by wrongdoing to a Confrontation Clause violation.").

[5] The conversation was admitted as part of Exhibit 38, which also contains two recorded messages Moss left on Officer Gooch's answering machine. Although Edwards objected to the admission of these messages at trial, Edwards does not argue on appeal that the messages were admitted improperly, and contests the admission of only the conversation. Therefore, we do not decide whether these messages constitute excited utterances or whether they could be admitted as present sense impressions or under any other exception.

error.[6] In the conversation, Moss indicated two prejudicial facts about Edwards: (1) people thought he was selling drugs in the neighborhood; and (2) Edwards had shot Moss. Evidence that people thought Edwards was dealing drugs in the neighborhood was introduced during Foster's testimony when he said, "Michael Moss did not want Djuan Edwards selling drugs in front of his house." Tr. at 131, 132. Then, Edwards's attorney asked Foster on cross-examination, "you had a conversation – I guess with Mr. Edwards about him possibly being involved with drug transactions by your mother's house?" Id. at 164. There was also independent evidence that Edwards had shot Moss on May 17th. Foster indicated that he was concerned for Moss's safety "[b]ecause of the incident on May 17th." Id. at 185. Other evidence, including the testimony of Officer Gooch, indicates that Moss had been shot on May 17.[7] Id. at 189, 197. Thus, the evidence introduced through the recorded conversation is cumulative of other evidence. When erroneously admitted evidence "is merely cumulative of other properly admitted evidence, the substantial rights of the party have not been affected, and we deem the error harmless." Smith v. State, 839 N.E.2d 780, 784 (Ind. Ct. App. 2005).

Moreover, an error in the admission of evidence is harmless "[w]hen there is substantial independent evidence of guilt such that it is unlikely that the erroneously admitted evidence played a role in the conviction." Id. The eyewitness testimony of Foster indicating Edwards as the shooter, and the identifications of Edwards by Adkisson and Moss supplied

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[6] We also find that if any error exists in the admission of the messages left by Moss on Officer Gooch's answering machine, the error is harmless.

[7] The message Moss left on Gooch's answering machine on May 25th also indicates that Edwards had previously shot Moss. State's Exhibit 38b.

substantial evidence for the jury to convict Edwards. We hold that admission of the recorded conversation between Moss and Officer Gooch did not affect the jury's decision and the error in admission is harmless.[8]

II. Foster's 911 Call

Edwards argues that the admission of the 911 call placed by Foster before Edwards shot Foster and Solomon violated his right to confrontation guaranteed by the Sixth Amendment to the United States Constitution. Although Edwards had the opportunity to confront Foster at trial, Edwards argues that his right to confrontation was violated because part of the information that Foster gave the 911 operator was given to him by Moss. We hold that the entire statement was not testimonial and therefore not subject to the Confrontation Clause, and that it was properly admitted under the prior identification and present sense impression exceptions to hearsay.

A. Standard of Review

The Sixth Amendment guarantees a criminal defendant "the right … to be confronted with the witnesses against him." U.S. Const. Amend. VI. When an evidentiary ruling affects this right, we review the ruling de novo. United States v. Gilbertson, 435 F.3d 790, 794 (7th Cir. 2006).

B. Admission of the 911 Call

[8] Although we do not reach Edwards's Confrontation Clause argument, if a Confrontation Clause violation occurred, we conclude that the error was also harmless. See Averitte v. State, 824 N.E.2d 1283, 1288 (Ind. Ct. App. 2005) ("A denial of the defendant's Sixth Amendment right constitutes harmless error where the evidence supporting the conviction or enhancement is so convincing that a jury could not have found otherwise.").

The right to confront witnesses applies only to evidence that is "testimonial." Davis v. Washington, 126 S.Ct. 2266, 2273 (2006). Thus, "[h]earsay evidence that is nontestimonial 'is not subject to the Confrontation Clause.'" United Sates v. Ellis, 460 F.3d 920, 923 (7th Cir. 2006) (quoting Davis, 126 S.Ct. at 2273). Therefore, we first decide if a statement challenged under the Confrontation Clause is testimonial. If it is, we decide if the admission of the statement violated the defendant's right to confrontation. If the statement is not testimonial, the Confrontation Clause does not apply, and we apply the rules relating to hearsay to determine the statement's admissibility. Davis, 126 S.Ct. at 2273.

1. Statements Made on the Tape Are Not Testimonial

In Davis, the United States Supreme Court established the following test to determine whether a statement is testimonial for purposes of the Confrontation Clause:

> Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.

126 S.Ct. at 2273-74. The Court explained that "statements made in the absence of any interrogation are [not] necessarily nontestimonial," and that "it is in the final analysis the declarant's statements, not the interrogator's questions, that the Confrontation Clause requires us to evaluate." Id. at 2274 n.1.

In the context of 911 calls, the Court noted that such calls are "ordinarily not designed primarily to establish or prove some past fact, but to describe current circumstances requiring

police assistance." Id. at 2276. "This is true even of the operator's effort to establish the identity of the assailant, so that the dispatched officers might know whether they would be encountering a violent felon." Id.

We find that no part of the recorded 911 call is testimonial, including Foster's statements made with his personal knowledge, Foster's statements made at the direction of Moss, and Moss's statements that are audible in the background.

Foster went to Moss's house in the first place because he was "concerned because … [Edwards] wasn't supposed to be over there." Tr. 128. Although Foster called 911 in part to disclose Edwards's presence because Moss and Foster thought that Edwards was wanted in connection with the May 17 shooting, and assumed the police would come to arrest Edwards, id. at 184, Foster also called 911 because he "[felt] like [Edwards] was a threat," id. at 133, and was "concerned for Michael Moss." Id. at 185. While Moss and Foster hoped that the call would lead to Edwards's arrest, safety was their primary concern; Edwards's arrest was merely the means by which their safety would be ensured. Therefore, the call concerned primarily what was happening on May 29th, the presence of a dangerous individual across the street from Moss's house, and not what had happened on May 17th. Cf. Davis, 126 S.Ct. at 2278 (finding a statement testimonial that did not deal with an emergency in progress and was elicited from an officer "not seeking to determine … 'what is happening,' but rather 'what happened"). Indeed, Foster's call gave the police no information that they did not already have except for Edwards's location at that moment. The recording contains only nontestimonial statements, and therefore its admission did not implicate Edwards's right to

confrontation.

2. Admissibility of the Recording Under Hearsay Rules[9]

Foster's statements indicating that Edwards was across the street from Moss's home are not hearsay by definition, as the recorded statement is an identification of Edwards made by Foster shortly after seeing Edwards, and Foster was a witness subject to cross examination regarding his statement to the 911 operator. Ind. Evidence Rule 801(d)(1)(C); Dickens v. State, 754 N.E.2d 1, 6 (Ind. 2001). Defense counsel had the opportunity to cross-examine Foster regarding his identification, and indeed, Edwards's attempt to discredit Foster's eyewitness testimony was his principal defense.

The statement is also admissible under the present sense impression exception to hearsay.[10] Foster had seen Edwards across the street prior to making the call, so Foster was describing a material event, Edwards's presence at the scene, immediately after perceiving it. It is immaterial that Foster repeated some information given to him by Moss, such as the spelling of Edwards's name and the address of the house. Moss's statements are not inadmissible hearsay as they fall under the present sense impression exception, and Foster's statements all relate to his identification of Edwards. Moreover, Foster did not need Moss's information in order to know that Edwards was across the street. The tape was introduced to

[9] Edwards argues that the statement is inadmissible because it does not qualify as an excited utterance. We do not address this argument because the trial court admitted the tape under the present sense impression exception, tr. at 177, and we conclude that the statement is admissible under either that exception or Indiana Evidence Rule 804(d)(1)(C).

[10] Indiana Evidence Rule 803(1) identifies as an exception to hearsay, "[a] statement describing or explaining a material event, condition or transaction, made while the declarant was perceiving the event, condition or transaction, or immediately thereafter."

prove Edwards's presence at the scene, and Foster's statement to the 911 operator was a relation of this material condition immediately after Foster observed it. The trial court did not err in admitting the recording of the 911 call.

III. Edwards's Motion for a Mistrial

At the close of the State's opening statement and again at the close of evidence, Edwards moved for a mistrial on the grounds that the display of the chart listing Edwards as a defendant in the murders of Moss and Adkisson put Edwards in grave peril of conviction based on unfair prejudice. The trial court denied the motions. Edwards now argues that the trial court erred in denying his motions for a mistrial.[11] We hold that the trial court acted within its discretion in denying Edwards's motions.

A. Standard of Review

Whether to grant a motion for mistrial lies within the trial court's sound discretion. Pavey v. State, 764 N.E.2d 692, 698 (Ind. Ct. App. 2002), trans. denied. We give great deference to the trial court's decision because it is in the best position to evaluate the circumstances of the event and its probable effect on the jury. Id. "To prevail on appeal from the denial of a motion for mistrial, the defendant must establish that the questioned

[11] Edwards does not argue that the State deliberately violated the trial court's order and thus put an "evidentiary harpoon" in front of the jury. See Kirby v. State, 774 N.E.2d 523, 535 (Ind. Ct. App. 2002), trans. denied ("An evidentiary harpoon is the placing of inadmissible evidence before the jury with the deliberate purpose of prejudicing the jurors against the defendant. To prevail on such a claim of error, the defendant must show that: (1) the prosecution acted deliberately to prejudice the jury; and (2) the evidence was inadmissible."). However, we note that there is no evidence that the State acted deliberately. The display of the information was apparently the result of a misinterpretation of the trial court's order.

information or event was so prejudicial and inflammatory that he was placed in a position of grave peril to which he should not have been subjected." Harris v. State, 824 N.E.2d 432, 439 (Ind. Ct. App. 2005).

B. Denial of Motions

When a party violates an order regarding the admission of evidence, the trial court may act within its discretion in denying a motion for a mistrial and instead admonishing the jury. Alvies v. State, 795 N.E.2d 493, 507 (Ind. Ct. App. 2003), trans. denied. "A timely and accurate admonition is presumed to cure any error in the admission of evidence." Heavrin v. State, 675 N.E.2d 1075, 1084 (Ind. 1996) (quotation omitted). With regards to these admonitions, we presume that a jury follows the trial court's instructions. Harris, 824 N.E.2d at 440.

Here, the trial court considered the potential effect of the information displayed in the chart and determined that it could cure the violation with a limiting instruction, which it gave promptly after the violation. The trial court also prohibited the State from introducing evidence that Moss and Adkinson were deceased, and limited the State to offering evidence that they were unavailable. The trial court's final instructions also contained statements that limited any impact that the display of the chart may have had.[12] The trial court concluded

[12] Instruction 27 states: "Evidence has been introduced that the defendant was involved in other wrongful conduct other than that charged in the information. This evidence has been received solely on the issue of defendant's identity and motive. This evidence should be considered by you only for that limited purpose." Appellant's Appendix at 145.

Instruction 28 states: "…it would be your duty to acquit him even if you should believe from the evidence, that he has been shown to be guilty of wrong doing or, of other offenses not charged in the Information." Id. at 146.

that Edwards had not been placed in grave peril based on the steps the court took to limit the effect of the chart. We hold that this conclusion was not an abuse of the trial court's discretion.

Edwards argues that the statements of Juror No. 7 indicate that the chart had a prejudicial effect. However, the conversation between the trial court and Juror No. 7 actually indicates that the chart had no effect on the jury. Juror No. 7 indicated that the names "Michael Moss" and "April Adkisson" had sounded familiar, and that she thought she remembered reading of their murders in a newspaper. Juror No. 7 also indicated that there had been some discussion in the jury room of the failure of Moss and Adkisson to testify, and that another juror had said that she thought Moss and Adkisson were dead. However, if the jury had been affected by the information on the chart, there would have been no question in the jurors' minds as to why Moss and Adkisson had not testified. The fact that the jury was discussing why Moss and Adkisson were not at Edwards's trial indicates that the chart had no affect on the jury. Had the jurors recognized and processed the information on the chart, they would have known that Adkisson and Moss had been murdered, and that Edwards was charged in connection with their deaths. Although the information connecting Edwards to the deaths of Moss and Adkisson should not have been on the chart that the State displayed during its opening statement, we hold that this display did not put Edwards in grave peril. Therefore, the trial court acted within its discretion in denying Edwards's motion for a

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Instruction 32 stated: "Statements made by attorneys are not evidence. Opening statements should be considered only as a preview of what the attorneys expect the evidence will be. … Only the evidence and exhibits received from the witness stand may be considered in your deliberation." Id. at 150.

mistrial.

Conclusion

We hold that the error in admission of the recorded conversation between Moss and Officer Gooch did not affect Edwards's substantial rights and was therefore harmless. We further hold that the trial court properly admitted the recording of the 911 call made by Foster, and acted within its discretion in denying Edwards's motion for a mistrial. We affirm Edwards's convictions.

Affirmed.

SHARPNACK, J., and NAJAM, J., concur.